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No. 316

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANK R. MCNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PAUL R. HEITMEYER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the above petitioners, constituting the Federal Communications Commission, prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the District of Columbia entered on May 24 1939, commanding the Commission to set aside its order designating Heitmeyer's application for hearing on a comparative basis with other applications and directing the Commission to hear and reconsider the application on the basis of the record as originally made.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia has not yet been reorted (R. 52).

JURISDICTION

The order of the United States Court of Appeals sought to be reviewed was entered on May 24, 1939 (R. 70); and a petition to vacate an order granting a writ of mandamus and a motion for leave to appear and be heard were denied July 12, 1939 (R. 90). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

The Commission denied respondent's application for a construction permit for a radio broadcast station on the sole ground that it was not financially responsible. The court below reversed and remanded with instructions to proceed in accordance with its opinion. The Commission set the remanded cause for further hearing in consolidation with a hearing de novo on two other applications. The question is whether the court below has power to issue a writ of mandamus to compel the

[1] If the petition is granted, a second question will be urged in the argument on the merits. This question is whether the court, after its order denying respondent's motion for an order directing a hearing on the original record and on a noncomparative basis, had power in a subsequent and independent proceeding between the same parties to grant the same relief through issuance of a writ of mandamus.

Commission to reconsider petitioner's application on the original record and without regard to the subsequent applications.

STATUTE INVOLVED

The applicable provisions of the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended, are printed in the Appendix to the petition in *Federal Communications Commission* v. *The Pottsville Broadcasting Co.*, No. 265, this Term.

STATEMENT

On March 25, 1935, Paul R. Heitmeyer filed an application with the Federal Communications Commission for a construction permit to erect a new radio broadcast station in Cheyenne, Wyoming (R. 1, 42). The Commission on July 30, 1935, designated this application for hearing together with the application of the Wyoming Radio Educational Association, which desired a permit to construct a similar station in the same city (R. 42). Hearing was held on October 30, 1935, before an examiner, who recommended in his report that Heitmeyer's application be granted (R. 43). Upon consideration by the Commission, however, Heitmeyer's application was denied on May 1, 1936, upon the sole ground of failure to establish the requisite financial qualifications (R. 3–6). On June 29, 1936, Heitmeyer appealed under Section 402 (b) of the Communications Act of 1934 to the United States Court of Appeals for the District of Co-

lumbia, from the Commission's order denying his application for a construction permit. The court reversed the Commission's decision and remanded the case on December 27, 1937, with instructions to proceed with the application in conformity with its opinion (R. 14). The opinion recited that "This does not mean that it is directed to issue a permit to the appellant. It is not the function of this Court to revise the action of the Commission from an administrative standpoint and to make an administrative judgment * * * the Commission in its further action is to respect and follow the * * * determination of the questions of law by this Court" (R. 13).

On January 15, 1938, Heitmeyer petitioned the Court of Appeals for an order which would stay the Federal Communications Commission, pending final decision of the cause, from granting a construction permit or license that would prevent or seriously interfere with the granting of petitioner's application. He pointed out that while the case was pending in that court another application for a station in Cheyenne had been filed by the Frontier Broadcasting Company; that a second applicant, the Cheyenne Radio Corporation, had filed an application requesting the same facilities requested by Heitmeyer, and that the granting of either of the two other applications would seriously prejudice his rights (R. 14–16). The court, on January 20, 1938, ordered that the Commission stay all further proceedings relating to the granting of a per-

mit for a broadcasting station at Cheyenne, Wyoming, until such time as final determination could be had of Heitmeyer's application (R. 16).

The Commission, on March 3, 1938, moved to vacate the stay of January 20, 1938, on the ground that it was its duty under the statute to hear the related applications on a comparative basis (R. 17–19). Heitmeyer on March 7, 1938, filed a motion to deny the petition which urged that he was entitled to a prior, noncomparative consideration on the record as originally made before his appeal to the court (R. 20–25). The Court of Appeals, on March 17, 1938, granted the Commission's motion to vacate the stay of January 20, 1938 (R. 29). Thereupon, the Commission on April 20, 1938, directed that the record in the case be reopened for further hearing before an examiner, consolidated with a hearing *de novo* which was ordered upon the applications of the Frontier Broadcasting Company and the Cheyenne Radio Corporation [2] (R. 35, 36).

Heitmeyer, on April 27, 1938, filed a motion in the court below, praying that the court issue a rule upon the Commission to show cause why it had not complied with the judgment of the court in reversing the Commission's action; he contended that the Commission had no power to take any action other than to reconsider the record as originally made (R. 30–33). Opposition to this motion was filed by the Commission on April 30, 1938 (R. 33).

[2] This latter application has been dismissed and is no longer involved in these proceedings.

The court on May 12, 1938, denied Heitmeyer's motion for the rule (R. 38). On May 23, 1938, the court denied Heitmeyer's motion (R. 39) to stay the effective date of the denial of his motion for rule to show cause, so that he could apply for certiorari to this Court (R. 40).

Heitmeyer then filed a bill of complaint in the United States District Court for the District of Columbia on June 1, 1938, praying that the Commission be permanently enjoined from granting any construction permit to any other applicant for a radio station at Cheyenne until after the Commission had rendered a decision on the record as made at the original hearing on Heitmeyer's application (R. 40–50). The Commission moved to dismiss on June 7, 1938 (R. 50). The motion was denied June 30, 1938 (R. 51). On April 3, 1939, the Court of Appeals, on a special appeal, held that the lower court was without jurisdiction and reversed and remanded the case with instructions to dismiss the bill, without prejudice to the application of Heitmeyer to the Court of Appeals for a writ of mandamus. The opinion pointed out that the court's decision in the *Pottsville* case was controlling and that Heitmeyer should have applied to the Court of Appeals for a writ of mandamus[1] (R. 52–54). Pe-

[1] *The Pottsville Broadcasting Company, appellant,* v. *Federal Communications Commission, appellee; Schuylkill Broadcasting Company, intervener,* decided April 3, 1939, not yet reported. A petition for writ of certiorari has been filed in this case, No. 265, this Term.

tition for rehearing was filed by the Commission on April 20, 1939, requesting the court to delete the language from the court's opinion which stated that Heitmeyer was entitled to apply for a writ of mandamus; this was on the ground that Heitmeyer had previously by a motion for rule to show cause sought this remedy unsuccessfully, and the matter was therefore res adjudicata (R. 55–64). Heitmeyer filed an opposition to the Commission's petition for rehearing on April 25, 1939 (R. 64).

While the petition for rehearing was pending, Heitmeyer in the appeal from the District Court, filed a petition for mandamus on May 3, 1939 (R. 66). The Commission filed an opposition on May 8, 1939, simply pointing out that the petition for mandamus was filed in the wrong case (R. 68–69). The court denied the Commission's petition for rehearing on May 23, 1939, and issued an order directing the issuance of a writ of mandamus on May 24, 1939 (R. 70). On May 25, 1939, the court directed that the entries respecting the petition for writ of mandamus be transferred from the docket pertaining to the appeal from the District Court to the original docket (R. 71). On the same day, May 25, 1939, the court below stayed the issuance of the writ for thirty days (R. 71). The Commission on June 9, 1939, filed a petition to vacate the court's order of May 24, 1939, stating that the order had been entered without the Commission's having been given an opportunity to file briefs or to appear and be heard (R. 72–74). On June 19, 1939, Heit-

meyer filed his opposition to the Commission's petition to vacate the order (R. 74). The court suspended its order on June 20, 1939, for a period of ten days, with leave to the Commission within five days to file its grounds of opposition and with leave to Heitmeyer to file an answer thereto within the succeeding five days (R. 76). The Commission filed its opposition on June 26, 1939 (R. 76). The Commission filed another petition, on July 6, 1939, to vacate or further suspend the order and also a motion for leave to appear and be heard (R. 85, 87); Heitmeyer filed an opposition on July 11, 1939 (R. 89). The court on July 12, 1939, entered an order denying the Commission's petition and motion and directing that the original order of mandamus issued on May 24, 1939, continue in full force and effect (R. 90).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In misinterpreting Section 402 (e) of the Communications Act of 1934, providing that "review by the court shall be limited to questions of law";

2. In issuing a writ of mandamus to control the purely administrative functions of the Commission;

3. In assuming that an appeal from the Commission should have the same effect and be governed by the same rules as an appeal from a lower federal court to an appellate court;

4. In assuming that the Commission was not conforming and would not conform fully and properly with the previous decision of the court below in this case;

5. In misconstruing the rules of practice of the Commission, particularly Rule 106.4 applicable to the fixing of dates for hearings on conflicting applications for related matters;

6. In subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant who happened to be the first to file for given facilities and also has obtained judicial review of the Commission's denial of its application;

7. In assuming that the court, after entering its judgment under Section 402 (e) of the Communications Act of 1934, has authority to control the Commission's action in respect of matters not in issue before the court or included in its judgment of reversal;

8. In issuing a writ of mandamus where the petitioner had not exhausted its administrative remedies, had not shown a clear right to the relief or any threat of injury if the writ were denied, and asked relief which contradicted the statutory duty of the Commission;

9. In directing the Commission to set aside its order of April 20, 1938, which designated Heitmeyer's application for hearing in consolidation

with the application of Frontier Broadcasting Company;

10. In commanding the Commission to hear and reconsider Heitmeyer's application on the basis of the record as originally made;

11. In readjudicating an issue previously determined and therefore res adjudicata.

REASONS FOR GRANTING THE WRIT

The principal issue in the instant case is substantially similar to the issue in *Federal Communications Commission* v. *Pottsville Broadcasting Company,* in which a petition for certiorari was filed with this Court on August 5, 1939, No. 265, this Term. The reasons for granting the writ set forth in the petition in that case apply with equal force here.[4]

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[4] If the petition is granted, we shall urge another ground in the argument on the merits for the conclusion that the court below had no power to order the issuance of a writ of mandamus to compel the Commission to consider Heitmeyer's application on the original record and on a non-comparative basis. Heitmeyer had sought the same relief in his petition of January 12, 1938. The court below, on the Commission's motion and over Heitmeyer's objection, vacated the order giving Heitmeyer an interim stay on March 17, 1938, and on May 12, 1938, denied Heitmeyer's motion for a rule to show cause why the same relief should not be granted (*supra*, pp. 5–6). The writ of mandamus was issued in a subsequent proceeding between the same parties, presenting the same issues. It should, therefore, have been denied on the ground that the controversy was *res adjudicata*, a principle which governs mandamus proceed-

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

NEWMAN A. TOWNSEND,
Acting Solicitor General.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.

August 1939.

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ings as well as other actions. See *Louis* v. *Brown Township*, 109 U. S. 162, 166; *Nalle* v. *Oyster*, 230 U. S. 165, 180–182.

U. S. GOVERNMENT PRINTING OFFICE: 1939